BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 89-64-E - ORDER NO. 90-344

APRIL 3, 1990

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| IN RE: Berkeley Electric Cooperative, Inc. | | |
| Plaintiff, | | |
| v. | | ORDER |
| South Carolina Electric & Gas Company, | | |
| Defendant | | |

On March 15, 1990, South Carolina Electric & Gas Company, Inc. (SCE&G) filed a Petition for Rehearing of Order No. 90-47 in the above-captioned matter with the Public Service Commission of South Carolina (the Commission). On March 27, 1990, Berkeley filed a Petition for Rehearing, Reconsideration or Modification of Order No. 90-47. The Commission, after a thorough review of the record, determines that the Petition for Rehearing of SCE&G should be denied. The Commission will address each assertion of error.

1. Does the Commission, under Chapter 27 of Title 58, and any other applicable statutes, have subject matter jurisdiction to enter the Order and compel the relief contained therein.

The regulation of public utilities is vested in The General Assembly by Article IX §1 of the South Carolina Constitution. The Public Service Commission has been granted by the General Assembly the statutory authority to assign and regulate electric service territory pursuant to Chapter 27 of Title 58 including S.C. Code Ann., §§58-3-140, 58-27-40 and 58-27-610 et seq. (1976), as amended. The regulation of electric service by the State (as delegated to the Commission) is an exercise of the police powers of the State. As observed by the U.S. Supreme Court, "the regulation of utilities is one of the most important of the ... police powers of the States." Arkansas Electric Cooperative, Inc. v. Arkansas Public Service Commission, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1 (1983), citing Munn v. Illinois, 94 U.S. (4 Otto) 113, 24 L.2d 77 (1877). The General Assembly, to enforce its police powers, has granted the Commission authority to regulate the provision of electrical service.

2. Does Order No. 90-47 violate Article VIII, §15 of the South Carolina Constitution.

Article VIII, §15 states that the consent of the municipality must be obtained in order to use the municipality's streets to provide electric service. In this case there is no constitutional issue concerning municipal consent because both Berkeley and SCE&G have the City's consent to use its streets.

3. Does the rule enunciated by the South Carolina Supreme Court in the Seneca case apply to investor owned utilities.

It is not necessary to address this issue. The Seneca case limited Act 431's applicability with respect to a municipal electric utility's right to serve in assigned territory inside municipal limits. In the Seneca case, the City of Seneca itself served the customer. In this case, the City of Charleston granted a franchise to both Berkeley and SCE&G and therefore, the issue in the Seneca case is not before the Commission.

4. Does Order No. 90-47 constitute an unconstitutional impairment of SCE&G's contracts with its customers on Johns Island and its franchise contract with the City of Charleston.

The contract clause of the constitution extends only a limited protection against impairment by subsequent legislation. When the subsequent exercise of legislative authority is within the State's police power, as it is in this case, the U.S. Supreme Court has held that no unconstitutional impairment exists. The Court stated "that parties, by entering into contracts, may not estop the legislature from enacting laws intended for public good." Maniqualt v. Springs, 199 U.S. 473, 50 L.Ed, 274, 26 S. Ct. 127 (1905). Furthermore, the franchise granted to SCE&G by the City of Charleston was granted "upon the express understanding and provision that it is given subject to the constitution and laws of

the State of South Carolina." (Ordinance ratified by Charleston City Council, August 15, 1972, Paragraph 18) Furthermore, the city franchise also provided that SCE&G shall contruct and extend its electric distribution system and supply standard electric service under "general terms and conditions approved by the South Carolina Public Service Commission." Consequently, a contract which by its own terms is subject to approval of the Commission and the laws and constitution of this State cannot be said to be impaired by any act of the legislature in the exercise of its police power, or by any legitimate order of the Commission.

5. Does Order No. 90-47 constitute a taking of SCE&G's property interests by a public agency without reasonable compensation.

As the United States Supreme Court stated in Union Dry Goods Co. v. Georgia Public Service Corpor., a regulatory agency's setting of rates contrary to a previous contract was neither an impairment nor a taking. The Court quoted from Louisville & Nashville Railroad Company v. Motley[1] case, supra, saying

> It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power, can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are

1.219 U.S. 466, 55 L.Ed. 297.

held subject to its fair exercise.[2]

SCE&G's claim of property interests arise out of its franchise with the City of Charleston. These rights are subject to modification, amendment and divestment upon the exercise of the police power of the State. It was stated in the U.S. Supreme Court case of Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 58 L.ed. 721, 34 Sup. Ct. Rep. 364, (1914).

> "...the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation..."

Under these principles of law, SCE&G's property rights claimed have not been subject to an unconstitutional taking without compensation.

6. Has the City of Charleston consented to Berkeley's service of customers that have chosen SCE&G and not Berkeley as their electric supplier and has the City in fact not designated the supplier chosen by the customer to be the supplier to provide service.

The fact that the City of Charleston granted Berkeley a franchise is uncontroverted. The City of Charleston and Berkeley Electric Cooperative entered into an agreement on April 4, 1989, for Berkeley to continue and extend the furnishing of electrical service to different classes of customers within the corporate

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2.248 U.S. 372, 63 L.ed 309, 39 Sup. Ct. Rep. 117.

limits of the City on Johns Island that are within the territory previously assigned to Berkeley by the Commission, within such areas that may be hereafter annexed to the City. This agreement was made part of Berkeley's amended complaint.

7. Does the granting of a franchise to Berkeley affect SCE&G's rights to serve customers from the line it undertook to build on Johns Island before Berkeley's franchise was granted.

SCE&G constructed lines into Berkeley's assigned territory at its own risk. The Commission, in Order No. 89-166, ruled that if the Commission ultimately ruled against SCE&G in this Docket that SCE&G could be ordered to remove any facilities it has put into place. The Commission did rule against SCE&G in Order No. 90-47 and SCE&G must remove its lines.

8. Did SCE&G reasonably rely on its status as the sole franchised supplier in the City of Charleston to construct the line in question.

By the terms of the City of Charleston's franchise to SCE&G, SCE&G was on notice that its franchise rights were subject to the Constitutional Laws of the State of South Carolina. (Ordinance ratified by Charleston City Council, Aug. 15, 1972, Paragraph 18). As stated by the South Carolina Supreme Court in Abbeville, any exemption from regulation which municipalities enjoy is statutory.

The Court held that the General Assembly may modify or abrogate this exemption. Furthermore, in City of Charleston v. Tatum, 177 S.E. 541 (1934) the Court held that "all contracts made by a utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the State of its regulatory powers whenever the public interest may make it necessary." And as stated in Paragraph 4, above, the parties by entering into a contract with the City cannot estop the Legislature from enacting laws intended for the public good. Maniqualt v. Springs, 199 U.S. 473, 50 L.Ed., 274, 26 S.Ct. 127 (1905).

Furthermore, the Commission, by Order No. 17,176, dated October 17, 1973, assigned the area in question on Johns Island to Berkeley. Act 431 of 1984, under the facts of this case, maintained that assignment and the force and effect of that order.

9. Was SCE&G under a duty as the sole franchised supplier in the City of Charleston to extend service to customers in annexed areas of the City when requested to do so.

SCE&G was put on notice in the Commission's Order No. 89-166 in this Docket dated February 21, 1989, that if the Commission ultimately ruled against SCE&G that SCE&G could be ordered to remove any facilities it has put into place. The Commission, as set forth in its answer to No. 1 above, is the party who must ultimately rule on electric service rights in this state.

10. Does Order No. 90-47 constitute the grant of an exclusive municipal utility service franchise in violation of applicable statutes including but not limited to §58-27-410 of the Code of Laws of South Carolina, 1976.

The Commission's Order does not grant an exclusive franchise within the meaning of 58-27-410. This statute relates to franchises granted by municipalities, not franchises granted by the South Carolina Public Service Commission. The Order provides that pursuant to Act 431, under the facts of this case, Berkeley's right to serve in its assigned territory on Johns Island that has been annexed by the City is exclusive vis-a-vis SCE&G.

11. Is Order No. 90-47 consistent with Order No. 88-542, entered in Docket No. 87-461-E, and the Circuit Court Order upholding that Order in Docket No. 88-CP-40-4265.

SCE&G does not state in what way Order No. 90-47 might be inconsistent with the other two orders, therefore, it is difficult to respond. However, the facts and the law applied in this case are very distinquishable from those in the case before the Commission in Docket No. 87-461-E.

The Commission's Order in Docket No. 87-461-E was based on its conclusion that Act 431 of 1984 did not apply so as to preserve corridor rights of electric suppliers within areas annexed after the passage of Act 431. Any language contained in Order No. 88-542

which may have addressed assigned territory is merely dicta and is not controlling. Here, the issue was the preservation of service rights within Commission assigned territory after annexation.

Furthermore, the Commission's Order in Docket No. 87-461-E concluded that the service of Berkeley in that case would seriously infringe rights of municipalities to control the use of their streets and public places. In the present case, the City of Charleston has granted to Berkeley the right to use its streets and public places. No constitutional right is involved in the case at hand.

Thus, it is obvious, that there are substantial differences in the issues in this case, as well as the applicable law.

12. Are the Orders referenced above in the Summerville case collateral estoppel or res judicata as between the parties.

An Appeal of the Summerville order has been filed with the South Carolina Supreme Court. The issue of whether a circuit court order that has been appealed to the Supreme Court is a final order has not been addressed by the courts of this State. However, the courts in the surrounding jurisdictions of North Carolina and Georgia have addressed this issue and both courts agree that the pendency of an appeal from a judgment prevents its operation as res judicata. Baker v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, review denied 317 N.C. 700, 347 S.E.2d 35 (N.C. App. 1986); Greene v. Transport Ins. Co., 169 Ga. App. 504, 313 S.E.2d 761 (Ga. App.

1984).

Furthermore, the bases for asserting a plea of res judicata or collateral estoppel have not been met. As stated in Liberty Mutual Insurance Co. v. Employers Insurance of Wausau, 325 S.E.2d 566 (S.C. App. 1985), " 'res judicata' bars relitigation of the same cause of action while 'collateral estoppel' bars relitigation of the same facts or issues necessarily determined in the former proceeding."

In applying these rules to the Summerville case it is clear that the order is not res judicata and therefore is not conclusive of the issues in the Johns Island case. First, the causes of action are not identical. The cause of action in the Summerville case is based on the fact that SCE&G provided the electric service in the statutorily designated corridor of Berkeley. In the case before the Commission in this docket, SCE&G entered Berkeley's assigned territory to provide electric service in an area in which Berkeley had the franchise. One case deals with corridor rights and the other with assigned territory. Therefore, there is not identity of the cause of action, although the parties may be the same.

The U.S. Court of Appeals for the Fourth Circuit set forth the elements necessary to invoke the doctrine of offensive collateral estoppel. In C.B. Marchant Co., Inc. v. Eastern Foods, 756 F.2d 317 (4th Cir. 1985), the court in quoting from the U.S. Supreme Court in Parkland Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed. 552 (1979), identified the following considerations:

> (1) whether the plaintiff in the second action could have joined in the first suit; (2) whether the party against whom collateral estoppel is asserted vigorously prosecuted the first action; (3) whether the judgment relied upon as the basis for the estoppel is inconsistent with one or more previous judgments; and (4) whether the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.... Both cases further recognize that the preclusive effect of the prior judgment extends only to issues actually litigated and necessary to the outcome of the first action. (Emphasis added).

Furthermore, in Beal v. Doe, 315 S.E.2d 186 (S.C. app. 1984) the court held that:

> In order, however, to assert collateral estoppel successfully, the party seeking issue preclusion still must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment.

Thus, the Summerville order is not res judicata and therefore not conclusive of the issues in this case because the causes of action are not identical. The Summerville case involved a dispute over whether "corridor rights" survived annexation. This case in this docket involves a dispute over assigned territory. As previously stated, any language contained in the Summerville order which addresses assigned territory is mere dicta. Similarly, the Summerville order does not bar the litigation of the issues in this case because of collateral estoppel because the facts are different. Consequently, the Summerville order is not dispositive of the issues in this case.

13. Does Order No. 90-47 violate SCE&G's substantive due process rights to secure enjoyment of its property interests and customer service relationships.

The United States Supreme Court, in Union Dry Goods Co. v. Georgia Public Corpor., held that the regulatory agency's setting of rates contrary to a previous contract was neither an impairment nor a taking. The Court quoted from the Motley case, supra, and from Atlantic Coast Line R. Co. v. Goldsboro, [3] saying

> It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power, can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.[4]

In Atlantic Coast Line, the Court continued

> and the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law.

Therefore, the Commission's enforcement of a Legislative enactment protecting the public interest, is not a denial of SCE&G's substantive due process rights to secure enjoyment of its property interests and customer service relationships.

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3.232 U.S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364 (1914).

4.248 U.S. 372, 63 L. ed. 309, 39 Sup. Ct. Rep. 117

14. Is the relief granted by Order No. 90-47 just and reasonable, does it comport with statutory and constitutional mandates, and is it otherwise within the powers of the Commission.

The testimony in this case was extensive and spans thirteen (13) volumes of transcript. The Commission had the opportunity to hear and weigh the testimony of all witnesses and the public. The Commission's decision was just and reasonable and based upon reliable, probative evidence. The Commission, utilizing its unique technical experience and expertise, correctly exercised its authority under Title 58 Chapter 27 consistent with the S. C. Constitution and declared that Berkeley's service rights in its assigned area on Johns Island that had been annexed by the City are exclusive vis-a-vis SCE&G under the facts of this case and ordered SCE&G to dismantle its electric lines and electric facilities in Berkeley's assigned area on Johns Island.

15. Is Order No. 90-47 affected by errors of law.

SCE&G does not state what errors of law were made by the Commission which makes it difficult for the Commission to respond. However, the Commission's decision is consistent with prior Commission orders on territorial assignment, the recent S. C. Supreme Court decisions of Abbeville and Seneca, and the statutory law of this State.

16. Is Order No. 90-47 arbitrary and capricious, does it constitute an abuse of discretion or unwarranted exercise of discretion.

SCE&G does not state in what way the Order is arbitrary and capricious or constitutes an abuse or unwarranted exercise of discretion. This makes it difficult for the Commission to respond. However, the Commission's decision was based on a correct interpretation of existing state law. The Commission has the legal authority to rule on territorial assignment matters and there was no abuse or unwarranted exercise of discretion.

17. Is Order No. 90-47 supported by substantial evidence on the record as a whole.

SCE&G does not state which rulings in the order are not supported by substantial evidence. This makes it very difficult for the Commission to respond. However, the Commission's decision was primarily based on legal grounds but there was no ruling in the order that conflicted with any evidence in the record.

18. Was the testimony of Grover Croft properly excludable as hearsay or on other grounds, particularly given Mr. Croft's first hand knowledge of the Cooperatives' expectations and attitudes as expressed directly to him by the Cooperatives' representatives.

Mr. Croft's testimony was properly excluded. He did not have independent knowledge of the expectations and attitudes of the Cooperatives and if Mr. Croft was testifying to what the Cooperatives' representatives told him, then that is hearsay and inadmissible since it does not fall under an exception.

19. Did Act 431 impliedly repeal or amend the Territorial Assignment Act of 1969 or Section 58-27-1230.

The Legislature, by Act 431, provided for the continuation of Commission assignment of electric service territories in annexed areas under the facts of this case. Act 431 was enacted subsequent to the Territorial Assignment Act and Section 58-27-1230. In the City of Newberry v. The Public Service Commission of South Carolina, 287 S.C. 401, 339 S.E. 2d 124 (1986), the Court held that when there is a conflict between statutory provisions, the later enacted legislation prevails.

20. Does elimination of duplication require a finding that Section 58-27-1230 is amended.

The Commission's finding that Act 431 impliedly modified Section 58-27-1230 is proper. This finding addressed the issue of the applicability of the Territorial Assignment Act after passage of Act 431 of 1984.

If Section 58-27-1230 is not modified or amended by Act 431 of 1984 so as to prevent service by a franchised utility in the annexed, Commission assigned area, under the facts of the instant case, unnecessary duplication could not be prevented.

For the reasons stated above the Petition for Rehearing of SCE&G is denied.

As to Berkeley's Petition for Rehearing, Reconsideration or Modification, the Commission in order to correct any possible ambiguity in the order, hereby amends Order No. 90-47 and republishes the amended Order in its entirety as Appendix A. The amendments to Order No. 90-47 are found in the attached republished order on page 8, lines 16-20, and page 9, lines 8-11.

IT IS THEREFORE ORDERED:

1. The Petition for Rehearing filed by SCE&G is hereby denied.

2. The Commission's Order No. 90-47 is amended as set forth herein to correct any possible ambiguity as requested by Berkeley's Petition for Rehearing, Reconsideration, or Modification.

3. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director
(SEAL)

APPENDIX A

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 89-64-E - ORDER NO. 90-47

APRIL 3, 1990

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| Berkeley Electric Cooperative, Inc., | ) | |
| Petitioner, | ) | AMENDED |
| vs. | ) | ORDER |
| South Carolina Electric & Gas Company, | ) | |
| Respondent | ) | |

INTRODUCTION

On January 27, 1989, Berkeley Electric Cooperative, Inc. ("Berkeley" or "the Cooperative") filed a Petition and Rule to Show Cause seeking temporary and permanent injunctive relief requesting that the Public Service Commission of South Carolina direct South Carolina Electric & Gas Company ("SCE&G") to immediately cease and desist from any efforts to obtain rights of way for the construction of electric facilities and from the provision of electric service in the areas located within territory assigned by the Commission to Berkeley and annexed by the City of Charleston ("the City") on Johns Island. The Commission on February 15, 1989, heard oral arguments on the request for a cease and desist order.

The Commission denied the request for a cease and desist order and determined that a hearing should be held on the merits of the case. A hearing was begun on June 5, 1989 and continued intermittently through July 18, 1989. A night hearing was held for members of the public of Johns Island on June 8, 1989. Oral arguments on the law of the case were heard by the Commission on October 19, 1989. Numerous witnesses were presented and cross-examined during the hearing and 67 exhibits were admitted into evidence. The transcript of the hearing consisted of twelve volumes. Intervening in this matter were the Electric Cooperatives of South Carolina, Central Electric Power Cooperative, South Carolina Public Service Authority and the Johns Island Citizens for Cooperative Power.

There were four outstanding motions that the Commission indicated during the hearing that it would rule on in its final order. The first two motions involved testimony by Mr. Hanckel and Mr. Hart testifying on behalf of Johns Island Citizens for Cooperative Power concerning a purported zoning ordinance violation. The zoning ordinance was not put into the record, therefore, the Commission finds that the testimony of Mr. Hanckel and Mr. Hart concerning that ordinance should be stricken from the record. Another objection was made concerning the testimony of Grover Croft. Counsel for the Plaintiff alleged that Mr. Croft's testimony was hearsay due to the fact that his testimony concerned the expectations and attitudes of the cooperatives concerning territorial assignment. The Commission finds that Mr. Croft's testimony should be stricken. Mr. Croft could not have

independent knowledge of the thoughts of the cooperatives. The Plaintiff also moved that the testimony of Patricia T. Smith, an attorney for SCE&G, be stricken on the grounds that parts of her testimony contained conclusions of law concerning territorial assignment legislation. The Commission must make the conclusions of law; however, it allowed Ms. Smith's testimony to remain in the record and gave it the weight it thought was appropriate.

There was also discussion during the hearing about a Ferillo-Gregg memorandum that was declared confidential by Berkeley and put into the hearing record under seal. Subsequent to putting that memo under seal, the Commission ruled that certain documents submitted by SCE&G concerning developer incentive plans and other issues were not confidential over SCE&G's objections. SCE&G requested then that the Ferillo-Gregg memorandum also be declared not confidential and unsealed. The Commission finds that the Ferillo-Gregg memorandum does not contain confidential material and therefore should be unsealed.

The Commission after reviewing the evidence in the record, makes the following findings of fact and conclusions of law:

1. Berkeley Electric Cooperative is an electric distribution cooperative which has provided electric service for approximately fifty (50) years to residential and commercial consumers on Johns Island, Charleston County, South Carolina.

2. SCE&G is an electric supplier licensed to do business in the State of South Carolina. SCE&G has been providing utility service in the City of Charleston through predecessor companies

since 1846 and is currently operating in the City of Charleston pursuant to a franchise agreement.

3. Power is supplied to Berkeley Electric Cooperative for service on Johns Island through Central Electric Power Cooperative. Central Electric Power Cooperative is responsible for the planning, designing, financing and construction of any facilities above the distribution substation level necessary to meet the power requirements of its member cooperatives. Central serves fifteen (15) distribution cooperatives with Berkeley being one of those 15. Most of Central Electric Power Cooperative's power is purchased from the South Carolina Public Service Authority commonly called Santee Cooper.

4. On August 28, 1973, the Public Service Commission, pursuant to State law, assigned territory to Berkeley consisting of approximately 90% of the land area of Johns Island. Berkeley has been required by S. C. Code Ann., §58-27-1210 (1976), to provide electric service to all electrical consumers in the assigned area. Berkeley presently is providing electric service to approximately 3900 residential and commercial accounts in the Johns Island area.

5. Subsequent to this assignment of the Johns Island area to Berkeley by the Commission, the City of Charleston annexed portions of Johns Island, including a portion of the Johns Island territory assigned to Berkeley by the Commission.

6. Both Berkeley and SCE&G have been granted a franchise by the City of Charleston to use the streets and public places within the City.

7. SCE&G acquired easements, cleared right of way, solicited service accounts, and constructed electrical facilities in and across Berkeley's assigned territory for the purpose of providing electrical service to the Piggly Wiggly Shopping Center located within the assigned area of Berkeley that was annexed by the City in Johns Island.

8. The Territorial Assignment Act which was enacted by the South Carolina Legislature in 1969 established exclusive electric service territories throughout the State of South Carolina. Areas within municipalities were not covered by the Act.

9. The South Carolina Legislature in 1984 passed Act 431. This act provides that the policy of South Carolina is ". . . to maintain the assignment of electric service territories by the Public Service Commission over areas having been assigned to electric suppliers under Section 58-27-640, even when the area becomes incorporated or annexed to an existing city or town."

10. The Territorial Assignment Act as codified at Section 58-27-640 directed the Commission to assign "all areas that are outside the corporate limits of municipalities".

11. Act 431, as codified in Section 58-27-670, states "The furnishing of electric service in any area which becomes a part of any municipality after the effective date of this section, either by annexation or incorporation, whether or not the area, or any portion of the area has been assigned pursuant to Section 58-27-640, is subject to the provisions of Sections 58-27-1360 and 33-49-250 and any provisions of this article."

12. Act 431 was enacted after the 1969 Territorial Assignment Act, therefore, if there is any conflict between the two, Act 431 would prevail. ". . . when there is a conflict between statutory provisions the later enacted legislation prevails." The City of Newberry vs. Public Service Commission of South Carolina and Newberry Electric Cooperative, Inc., 287 S.C. 401, 339 SE 2nd 124 (1986).

13. Based upon the same principle of construction, Act 431 also impliedly modified Section 58-27-1230, which was passed as part of the Electric Utilities Act of 1932 and which permitted electric utilities to begin construction or operation of any electrical utility plant or system or of any extension thereof within municipal limits under certain conditions without first obtaining a Commission certificate of convenience and necessity.

14. The legislature's policy of eliminating unnecessary duplication through the maintenance of Commission assigned territories within annexed areas could not be accomplished if an electrical utility could, pursuant to Section 58-27-1230, continue to construct, extend, and operate its system within the newly annexed areas.

15. Section 58-27-670, as amended, contains the following language:

> "Annexation may not be construed to increase, decrease or affect any other right or responsibility a municipality, rural electric cooperative or electrical utility may have with regard to supplying electric service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58."

16. The legislature preserved in annexed areas the electric service rights electric suppliers already had in those areas when assigned by the Commission.

17. The S. C. Supreme Court in the City of Abbeville vs. Aiken Electric Cooperative, Inc., 287 S.C. 361, 338 S.E.2d 831 (1985) upheld Act 431's constitutionality, but in Blue Ridge Electric Cooperative vs. City of Seneca, _SC_, 376 S.E. 2d 514 (1989) the Court limited the Act's applicability with respect to a municipal electric utility's right to serve in assigned territory inside its municipal limits.

18. The Court declared in Seneca that a municipality may provide electric service to new customers and premises in an assigned annexed area. The purpose of the limitation in the Seneca case was to acknowledge the municipality's right to consent to the use of its streets under Article 8, Section 15 of the S. C. Constitution as upheld in Abbeville.

19. In this case there is no constitutional issue concerning municipal consent because both Berkeley and SCE&G have the City's consent to use its streets.

20. To the extent that it is consistent with the South Carolina Constitution, it is the duty of the Commission to carry out the statutory enactments that enforce the policy of Act 431, which is to preserve the integrity of territorial assignment.

21. Pursuant to Act 431, Berkeley's right to serve in its assigned territory on Johns Island that has been annexed by the

City is exclusive vis-a-vis SCE&G.

DISCUSSION

Although the Commission was presented much testimony from the parties in this case, the Commission's opinion is that the issues presented to it are primarily issues of law set forth as follows:

(1) Whether maintaining the integrity of territorial assignment would violate any constitutional rights of the City of Charleston and, if not,

(2) Does Section 3 of Act 431 require the Commission to uphold Berkeley's exclusive right to serve the area on Johns Island previously assigned to Berkeley and annexed by the City of Charleston.

The Commission is of the opinion and so finds that since the City of Charleston has granted both Berkeley and SCE&G the right to use its streets, alleys, or other public ways within the corporate limits of the City of Charleston and since the City of Charleston has consented to Berkeley's use of its streets and public places, no constitutional right of the City would be infringed by upholding Berkeley's exclusive right to serve, vis-a-vis SCE&G, the assigned territory.

Based upon the Commission's findings as set forth above, the Commission has determined that pursuant to Act 431, particularly Section 58-27-670 (1976), as amended, Berkeley has the exclusive right to serve the territory previously assigned to it on Johns Island and annexed by the City of Charleston.

The Commission does not find it necessary and therefore does not address the issue of what Berkeley's service rights would be without its franchise from the City of Charleston. Nor, does the Commission find it necessary to determine whether the City of Seneca case, which limited Act 431's applicability with respect to a municipal electric utility's right to serve in assigned territory inside municipal limits, applies to other electric utilities. In the Seneca case, the City of Seneca itself served the customer. In this case, the City of Charleston granted a franchise to both Berkeley and SCE&G, therefore, the issue in the City of Seneca case is not before the Commission.

Although the Commission is extremely concerned about the allegations made by witnesses supporting Berkeley regarding wasteful, unnecessary duplication in Berkeley's service area by SCE&G and unreasonable interference by SCE&G with Berkeley's electric system on Johns Island, due to the Commission's legal conclusion that in this particular case Act 431 mandates the maintaining of Berkeley's exclusive service rights in the subject area, the Commission need not address these allegations in this matter. It is also not necessary for the same reason to address Berkeley's allegation that SCE&G's construction of electric facilities in Berkeley's assigned area on Johns Island was an unconstitutional taking of Berkeley's property.

Based on the Commission's ruling that Berkeley's service rights are exclusive vis-a-vis SCE&G in its assigned area on Johns Island that has been annexed by the City, the Commission orders

SCE&G to dismantle its electric lines and electric facilities in the assigned annexed area. SCE&G may not provide electric service in Berkeley's assigned territory on Johns Island that has been annexed by the City.

IT IS THEREFORE ORDERED:

1. That Berkeley's electric service rights in its assigned area on Johns Island that has been annexed by the City are exclusive vis-a-vis SCE&G.

2. That SCE&G dismantle its electric lines and electric facilities in Berkeley's assigned area on Johns Island.

3. That the parties should cooperate with respect to minimizing or eliminating any inconvenience to any customer affected by this Order and that the parties work together to insure a smooth transfer of services.

4. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director
(SEAL)